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No. 96-8400

In The

Supreme Court of the United States

October Term, 1996

DOUGLAS McARTHUR BUCHANAN, JR.,

Petitioner,

v.

RONALD J. ANGELONE, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF OF RESPONDENT

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QUESTION PRESENTED

Would all reasonable jurists have been compelled in 1990 to accept Buchanan's claim that he unconstitutionally was denied sentencing instructions directing the jury that certain evidence was "a fact which mitigates" the death penalty, even though Buchanan was allowed to present any relevant mitigating evidence he desired, his counsel was allowed to argue that the evidence mitigated against the death penalty, the jury was directed to consider all the evidence and reject a death sentence if not justified even though an aggravating factor had been found, and the jury certified that it in fact had considered the evidence in mitigation before rendering its verdict?

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STATEMENT OF THE CASE

Ten years ago, on September 15, 1987, Douglas Buchanan, in a two-hour span in Amherst, Virginia, savagely murdered his father, step-mother and two step-brothers who were ten and thirteen years old. Buchanan planned the murders with his wife, and drove to his father's home on September 14, but decided not to carry out the plan that day. On September 15, he and his wife drove to a secluded area on the Blue Ridge Parkway. His wife stayed in the car while he walked to his father's house, armed with a loaded .22-caliber rifle and carrying gloves which he wore during the murders. He killed his father by shooting him with the rifle, once in the back of his head and a second time between his eyes, both shots fired at point-blank range. Buchanan dragged his father's body to a bedroom where he found a loaded .22-caliber pistol and lay in wait for the other family members to return home. (JA 79-80).

Fifteen minutes later, when his step-brothers arrived from school, Buchanan, who was hiding behind the front door, killed ten-year-old Donnie with the pistol as he came inside. Buchanan shot Donnie once in the back of his head and a second time in his right temple. Thirteen-year-old J.J. heard the shots from the yard and tried to run away, but Buchanan pursued him and shot him twice with the pistol. Under the pretense of helping the wounded boy, Buchanan was able to get J.J. inside the house where he then shot him a third time in his forehead. (JA 80).

Buchanan dragged the two boys' bodies to the bedroom, but J.J., miraculously still alive, got up and tried to get away. Buchanan, however, took a knife from the kitchen and killed him by stabbing him five times, twice

in the head and neck. Buchanan later described J.J. as a "tough kid" who just would not die. (Tr. 1501).

Finally, Buchanan ambushed his step-mother when she arrived home a short time later. He shot her once in the head with the pistol and then repeatedly stabbed her with the knife. He stabbed her four times in her chest and finally slashed her throat open down to her vertebrae, almost decapitating her. (JA 80-81).

Buchanan and his wife fled the State but were apprehended later in New Mexico. After initially denying his guilt, Buchanan fully confessed to the murders and never since has denied his guilt. During the guilt stage of trial, Buchanan's lengthy confessions were admitted into evidence and Buchanan himself testified about how he had accomplished the murders. (Tr. 773-918; 1070-1162). Buchanan was tried by a jury in the Circuit Court of Amherst County and found guilty of the premeditated murder of his family in a single transaction, a capital crime in Virginia. *See* Va. Code § 18.2-31(7) ("The willful, deliberate, and premeditated murder of more than one person as a part of the same act or transaction").

Before the separate sentencing hearing on the capital murder convictions required by Virginia Code § 19.2-264.3, the prosecutor had determined that he would be asking for the death penalty based solely on one of Virginia's two aggravating factors: "that [the defendant's] conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim." *See* Va. Code § 19.2-264.4(C). At the beginning of the capital sentencing hearing, the court instructed the jury that it would be determining whether Buchanan would receive a life or death sentence and that,

at the conclusion of the evidence, it would receive written instructions and a written verdict form. The court also instructed the jury that the parties had stipulated that the jury should consider, as part of the sentencing evidence, all the evidence already considered during the guilt phase of the trial. (JA 24-25). That evidence proved how the murders had been planned and carried out, as well as how the wounds had been inflicted, and what wounds had been inflicted on each victim.

In his opening statement at the sentencing phase, the prosecutor told the jury that he would be asking for the death penalty based upon the "vileness" of the crimes. (JA 25-26). He also "conceded" that the defendant had had a troubled childhood (JA 26) and that the defendant would be presenting psychiatric and other evidence. He then stated as follows:

> What you will have to do at the end of this hearing, is you will have to balance, as we suggested early on – you will have to balance these things that are in his favor against these horrible things that he has done. And you will have to weigh – you will have to decide what the case is worth.

(JA 27). In his opening statement, Buchanan's attorney announced to the jury, "I'm allowed to put on mitigation." (JA 29). He outlined generally what the defendant's mitigating evidence would be and told the jury he would be asking "that this man, Doug, not be executed because of the mitigation that we are going to present." (JA 29).

For two days, the jury then heard evidence from seven defense witnesses and eight prosecution witnesses. Buchanan's witnesses recounted in detail the circumstances of his childhood, including the fact that his mother had died from a fatal disease when Buchanan was

a boy, that his father had remarried and that his father and step-mother had prevented him from having contact with his grandparents, aunt and cousins who lived nearby. (Tr. 1256-1347).

Buchanan also presented extensive testimony from Dr. Brown, a psychiatrist, regarding the impact these events had had on him. Dr. Brown explained that he had been appointed by the court to evaluate Buchanan. (Tr. 1371). He opined that Buchanan was under extreme emotional stress at the time of the offenses, stress that had resulted from the manner in which the family had dealt with, and reacted to, events after his mother's death. (Tr. 1380). He admitted that the personality test he had administered showed that Buchanan had a "very high score on what is known as a psychopathic deviancy scale," but concluded that he was not a psychopath. (Tr. 1390-1391). On cross-examination, Dr. Brown also admitted that the tests showed Buchanan was immature, impulsive, hedonistic, rebellious, hostile, aggressive, frustrated, unable to learn from punishing experiences and tended repeatedly to get into the same types of trouble. (Tr. 1418-1419).

In rebuttal, the prosecution presented the testimony of, among others, two mental health experts, Drs. Lee and Gwaltney. These experts agreed generally with the factual events of Buchanan's life but not their effect on his commission of the crimes. Dr. Lee explained that he had been appointed by the court to evaluate Buchanan "with respect to mitigation in event of a capital murder conviction." (Tr. 1484). He opined that, while Buchanan was the victim of a tragic childhood, there was no evidence that the trauma of his mother's death was great, given the fact that from the age of two until her death when he was

nine, his grandparents had played a major role in his upbringing. (Tr. 1492). He also testified that, considering the facts of how the crimes had been carried out with planning and deliberation, there was no evidence that Buchanan was "acting under any form of severe emotional disturbance or that his mental state was affecting his judgment." (Tr. 1498). Dr. Lee concluded that at the time of the crimes, Buchanan "was functioning with [the] purpose of carrying out the original thing he mentioned – that they had talked about – having to settle things with his family, that they all deserved killing." (Tr. 1499).

Dr. Gwaltney explained that he too had been appointed by the court to evaluate Buchanan for "mitigating factors" under the "statutes." He told the jury he had been directed to look at "[a]nything about his background history, character, experiences," and specifically to determine "whether at the time of the offense, he was suffering from an extreme mental or emotional distress or disorder." (Tr. 1532). He further explained that he was directed also to determine "whether at the time of the offense he was so impaired that he could not . . . conform his behavior to the standards of law." (Tr. 1532).

Dr. Gwaltney testified that "there are many relevant factors in mitigation concerning his history and character that the trier of fact may – and I underline may – find relative to sentencing issues." (Tr. 1537). Like Dr. Lee, he believed that, considering the facts of the crime (including the planning, the parking the car away from the house, wearing gloves and hiding the bodies), Buchanan's capacity to conform his behavior to the requirements of the law was not significantly impaired and that Buchanan did not act under extreme mental or emotional disturbance at the time. (Tr. 1540, 1542). In fact,

while admitting that Buchanan might have acted with stress or excitement, Dr. Gwaltney testified that the type of methodical, well-organized behavior Buchanan exhibited could not have occurred if he had been under ***extreme*** distress. (Tr. 1542-1543).

The Commonwealth and Buchanan agreed (JA 39) that the court should instruct the jury with Virginia's pattern capital sentencing instruction that reads as follows:

> You are instructed that you have convicted the defendant of an offense which may be punishable by death. You must decide whether the defendant should be sentenced to death or life imprisonment.
>
> Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt that his conduct in committing the murders of Douglas McArthur Buchanan, Sr., Christopher Donald Buchanan, Joel Jerry Buchanan, and Geraldine Patterson Buchanan, or any one of them, was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the above four victims, or to any one of them.
>
> If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the requirements of the preceding paragraph, then ***you may fix the punishment*** of the defendant at death or if you believe from ***all the evidence*** that the death penalty is not justified, then you ***shall fix the punishment*** of the defendant at life imprisonment.
>
> If the Commonwealth has failed to prove beyond a reasonable doubt the requirements of the second paragraph in this instruction, then

> you shall fix the punishment of the defendant at life imprisonment.
>
> In order to return a sentence of death, all twelve jurors must unanimously agree on that sentence.

(JA 41-42)(emphasis added).

Buchanan tendered several other jury instructions to the court which were refused. Among those refused were four which specified certain circumstances - "no significant history of prior criminal activity," "extreme mental or emotion disturbance," a significant impairment of capacity "to appreciate the criminality of his conduct or to conform his conduct to the requirements of law," and Buchanan's age - and which unequivocally instructed the jury that each circumstance was ***"a fact which mitigates against imposing the death penalty."*** (JA 74-76) (emphasis added). The court also refused a fifth instruction that told the jury to "consider the circumstances surrounding the offense, the history and background [of Buchanan] . . . and any other facts in mitigation of the offense." (JA 74). Buchanan argued that he was entitled to instructions that contained the mitigation factors set out in Virginia's sentencing statute.[1] The court, however,

---

[1] At the time of Buchanan's trial, Virginia Code § 19.2-264.4(B) (1983 Repl. Vol.) provided, in pertinent part, that "Evidence which may be admissible, subject to the rules of evidence governing admissibility, may include the circumstances surrounding the offense, the history and background of the defendant, and any other facts in mitigation of the offense. Facts in mitigation may include, but shall not be limited to, the following: (i) The defendant has no significant history of prior criminal activity, or (ii) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance or (iii) the victim was a participant in the defendant's conduct or consented to the act,

refused the proffered instructions, noting that it was not proper to give instructions that singled out certain mitigating factors to a sentencing jury, according to precedent of the Supreme Court of Virginia. (JA 39-40).

In the extensive closing argument by the Commonwealth, the prosecutor told the jury it would have to decide between a life or death sentence and that the Commonwealth had to prove the aggravating factor beyond a reasonable doubt. (JA 42-43). He also acknowledged openly that the ***jury was required to consider Buchanan's mitigating evidence***. In pertinent part, he told them:

> In fairness to the defendant, understand that even if you find that there was the vileness that you do not have to return the death sentence. I will not suggest that to you. You are entitled to impart your personal judgment just as much as applying the law in deciding which punishment is fair.
>
> * * *
>
> But that's not the whole story. Then you've got to consider what you have heard the last day and a half - ***mitigation***, history, the things about the defendant, many of which he told you in his statements. You had that information when you went into the jury room on Thursday night. But we have heard it expanded, more clearly defined. We have some agreement among professional psychologists and psychiatrist. We have some disagreement.

---

or (iv) at the time of the commission of the capital felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired; or (v) the age of the defendant at the time of the commission of the capital offense.

* * *

> And so, ladies and gentlemen, the question comes down after you look at all of this evidence and I hope the answer is obvious to you.
>
> * * *
>
> [Dr. Gwaltney] had – he said – let's deal with the first one, was ***mitigating*** circumstances – and he admits, as does the Commonwealth, that there were some crummy things that happened to this young man in his home life. Then he was asked to deal with whether, at the time of the event, he was under extreme emotional – under the control of extreme emotional factors.

(JA 43-44, 57-58) (emphasis added).

The defense also made a lengthy closing argument in which it urged the jury to return a life sentence based upon the evidence in mitigation:

> Now, there is something in the law that's called ***mitigation***. Now ***mitigation*** – that doesn't mean that he is – that doesn't mean that he's making an excuse. ***Mitigation*** is not excuse. There's no excuse for what he did. But there – the law in its wisdom has given a jury and the court – if it's in the breast of the court – a way to weigh all the facets of a man's background, and the facets of any pressure that he happened to be under at the time that the act that he's charged with occurred. And if they think, in their wisdom, that there is some factor that has redeeming value or there is some factor that means that he has some, not excuse – but some reason not to get the death penalty, then you have a right to take that into consideration and give him life in prison.
>
> Now, the court – the jury – I keep saying the court, but the court and the jury can consider

almost anything. There are certain facts that are set down in the statute, but practically any factor can be considered in ***mitigation***.

Now, one of the factors, for example, is youth. That's set in the code. Youth is one of the factors that you can take into consideration.

* * *

I mean he's nineteen years of age and these psychiatrists and psychologists here said that he might be amenable to rehabilitation. So that is – that's one factor you can take in consideration when you come to your decision –

* * *

Now, the other things that you can take in consideration, and I'm going to read them because I don't want to mislead you in any way. . . . The others – he had no criminal record. Does the man have a criminal record? Now Doug Buchanan has no criminal record.

* * *

As I said, there are all sorts of facts you can take into consideration. But I'm going to read to you three others. We call your attention to three others. One of them – the second one that I would like to call your attention to – is that the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

* * *

So I suggest to you that the emotional disturbance, mental and emotional disturbance – and what this jury has got to decide is whether that was enough to mitigate this terrible, terrible crime.

* * *

But a decision of whether he should go to the electric chair shouldn't be made because you are mad. That's not what it is made on. It's made on whether there is ***mitigating*** circumstances. Not excuse, but ***mitigating*** circumstances.

* * *

I'm going to another one of the requirements. At the time of the commission of the capital felony – the felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired.

* * *

The existence of a single ***mitigating*** circumstance – if you don't believe but there is one ***mitigating*** circumstance, you can find that this boy – this boy should have a life sentence. That's all you have to have. The Commonwealth – if you will notice that the Commonwealth – if you can believe that this ***mitigation*** is enough to spare his life, you can do it. The Commonwealth has to prove all of their things in the instruction that all this was heinous and all, but if you believe that Doug had one ***mitigating*** thing, for example, you can – you can spare his life.

(JA 59-61, 64-66, 68) (emphasis added).

In rebuttal, the prosecutor argued that, despite the mitigating evidence, the appropriate sentence was death:

> He has talked about this concept of ***mitigation*** and he has talked about the fact that he admits guilt.
>
> * * *
>
> And I don't want you to be misdirected or misled about this concept of ***mitigation***. ***Mitigation*** is a balancing proposition. It is not a directory type of proposition. ***If the only question was is***

there mitigation, we could have stopped back on Thursday night. Even Dr. Lee and Dr. Gwaltney says yes, there is some ***mitigating*** circumstances. So don't be misled. This is not a proposition that if you find that there is some ***mitigation*** in it, that he had a crummy childhood, that he had parents who were not the best of parents, that he had a family situation that was not the best of family situations, that doesn't mean you have to come back in here with less than the maximum penalty. You've got to balance it. You've got to balance it.

* * *

Now, Mr. Poindexter attacks the statements and he says that they showed that he was under extreme emotional disturbance or distress and that's a ***mitigating*** circumstance. Remember Dr. Gwaltney's testimony this morning? Dr. Gwaltney says that there are relevant factors in ***mitigation*** concerning his history and character that the trier of fact – that's you folks – may find relative at sentencing issues. But he goes on to say there is no indication that at the time of the offenses, his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired.

* * *

Well, I am not going to sit here and argue to you that Douglas McArthur Buchanan, Jr., wasn't hyped up, wasn't emotionally aroused when he was about the act of killing someone. . . . But does that ***mitigate*** it?

* * *

Ladies and gentlemen, one thing that probably Mr. Poindexter and I agree about is this, and that is, that what you have to do, you have to

balance. If you believe the crime was vile, I am not going to sit here and suggest to you that you must bring back a sentence of death. That is not the law. You are entitled to follow your own caprice. You are entitled to consider all of the facts, the history, the ***mitigating*** circumstances, and all of those things. But what I suggest to you is this. I suggest again that you must bring back a sentence of death in this case because it is the only – it is the only reasonable sentence that can be given for acts such as this.

(JA 68-71) (emphasis added). The court then finally charged the jury again that it had two sentencing options reflected in the two written verdict forms and instructed the jury to retire with the verdict forms, instructions and all the exhibits in the case. (JA 72).

The jury ultimately returned with the following verdict:

> We, the jury on the issue joined, having found the defendant guilty of capital murder by having willfully, deliberately, and with premeditation killed Douglas McArthur Buchanan, Sr., Christopher Douglas Buchanan, Joel Jerry Buchanan, and Geraldine Patterson Buchanan, as part of the same transaction and having found unanimously that his conduct in committing the murders of the above four victims, or any one of them, was outrageously and wantonly vile, horrible, or inhuman, in that it involved torture, depravity of mind or aggravated battery to the above four victims, or to any one of them, and ***having considered the evidence in mitigation of the offense***, we unanimously fix his punishment at death. Signed Myra T. Ramsey, Foreman.

(JA 77) (emphasis added). After the verdict was read by the clerk in open court, the trial judge questioned the jury as follows:

> All right, now, members of the jury, you've heard your verdict read by t' Clerk. Is that the verdict of each and every on of you?

(Tr. 1662). After receiving an affirmative response, the judge asked each juror individually if the verdict was his or hers, to which question each responded affirmatively. (Tr. 1662-1664). Pursuant to Virginia Code § 19.2-264.5, the court subsequently conducted a second sentencing proceeding in which it imposed the sentences which had been fixed by the jury. Final judgment was entered on August 19, 1988.

On appeal to the Supreme Court of Virginia, Buchanan argued, among other things, that the trial court's refusal to give his proffered instructions on mitigating factors denied him due process as well as his rights under the Sixth, Eighth and Fourteenth Amendments. On September 22, 1989, in a unanimous opinion, the Virginia Supreme Court rejected Buchanan's claim of error based upon its precedent in *Watkins v. Commonwealth*, 229 Va. 469, 491, 331 S.E.2d 422, 438 (1985), *cert. denied*, 475 U.S. 1099 (1986). *See Buchanan v. Commonwealth*, 238 Va. 389, 416-417, 384 S.E.2d 757, 773 (1989). (JA 84). The Court affirmed Buchanan's capital murder conviction and death sentence. *Buchanan*, 238 Va. at 418, 384 S.E.2d at 774. Buchanan filed a petition for a writ of certiorari in this Court but did not present his "mitigation/instruction" claim. (Pet. No. 89-6107). On January 22, 1990, this Court denied certiorari review. *Buchanan v. Virginia*, 493 U.S. 1063 (1990).

Buchanan then filed a petition for a writ of habeas corpus in the Circuit Court of Amherst County that was dismissed on December 19, 1991. His subsequent petition for appeal to the Virginia Supreme Court was refused on June 25, 1992. In these petitions for collateral review, Buchanan raised the "mitigation/instruction" claim he had raised on direct appeal. The state courts refused to relitigate the claim. (Va. Sup. Ct. Order 6/25/92). (JA 1).

On petition for certiorari review of the state habeas corpus case, Buchanan presented virtually the same argument on the "mitigation/instruction" claim that is now under review. (Pet. No. 92-6018). This Court denied certiorari review of the state habeas corpus case on November 16, 1992. *Buchanan v. Murray*, 506 U.S. 988 (1992).

Buchanan then filed a petition under 28 U.S.C. § 2254 in the United States District Court for the Western District of Virginia. The district court dismissed the petition on January 25, 1996. (JA 85). The district court rejected the "mitigation/instruction" claim based upon binding precedent of the United States Court of Appeals for the Fourth Circuit. (JA 110-112). On appeal to the Fourth Circuit, a panel of the court unanimously affirmed the district court's dismissal on December 30, 1996. *Buchanan v. Angelone*, 103 F.3d 344 (4th Cir. 1996). Relying on its prior caselaw from as early as 1984 that had analyzed Virginia's sentencing scheme and instructions, the Court of Appeals found again that Virginia's instructions and verdict form comported with the Eighth Amendment. (JA 204-205). The Court of Appeals denied Buchanan's petition for rehearing and suggestion for rehearing in banc on January 27, 1997, with no member of the court requesting a poll on the suggestion for in banc review. (JA 215).

On February 10, 1997, pursuant to Virginia Code § 53.1-232.1, the Circuit Court of Amherst County set Buchanan's execution for April 8, 1997. On March 27, 1997, Buchanan filed the current petition for a writ of certiorari and an application for a stay of execution. In his petition, Buchanan raised three questions: (1) the same "mitigation/instruction" question he had raised in his previous petition for a writ of certiorari (No. 92-6018); (2) whether due process required the trial court to instruct the jury on mitigating factors contained in Virginia Code § 19.2-264.4(B); and (3) whether the trial court improperly had sustained a hearsay objection to a portion of his sentencing expert's testimony.

On April 8, 1997, this Court stayed the execution. On April 28, 1997, the Court granted the petition, limited to Question No. 1, whether the trial court had violated the Eighth Amendment by refusing Buchanan's proffered sentencing instructions on mitigation.

SUMMARY OF ARGUMENT

The Eighth Amendment's requirement for individualized sentencing in the "selection phase" of a capital murder proceeding differs markedly from its requirements for the "eligibility phase" of sentencing. The Amendment requires the States to adopt guidelines for the "eligibility phase" which narrow or channel the sentencer's discretion to impose the death penalty, but allows exactly the opposite for the "selection phase" because the sentencer must be given broad discretion to consider all relevant facts presented in mitigation regarding the ultimate decision to impose sentence. *See Eddings v. Oklahoma*, 455 U.S. 104 (1982).

Buchanan makes no complaint about Virginia's requirement that the jury's discretion be sufficiently guided at the "eligiblity phase" by requiring the finding of one of two aggravating factors beyond a reasonable doubt. Instead, he complains that his jury also was not sufficiently guided in the "selection phase" because the court refused to instruct his jury that if it found a specific circumstance to be true then that "is a fact which mitigates against imposing the death penalty." (JA 74-76).

The Virginia Supreme Court and the Fourth Circuit properly rejected the claim because Buchanan's jury was instructed to consider all the evidence and to impose a life sentence if it believed the death penalty was not justified, even if it had found the aggravating factor to exist. Moreover, the jurors individually expressly adopted the written verdict form which had been read to them in open court and which contained the certification that they had "considered the evidence in mitigation of the offense."

Under precedent existing in 1990 when Buchanan's case became final, as well as current precedent, a non-weighing State like Virginia was not required to instruct on specific mitigating factors so long as the jury was not prevented from considering mitigating evidence and especially where, as in Virginia, the jury was given unfettered discretion at the "selection stage" to impose a life sentence. *See Tuilaepa v. California*, 512 U.S. 967, 978 (1994); *Zant v. Stephens*, 462 U.S. 862, 889 (1983). Buchanan may not obtain relief in this collateral proceeding because it cannot be said that no reasonable jurist could have rejected his claim in 1990.

ARGUMENT

THE EIGHTH AMENDMENT NEVER HAS DICTATED THAT A SENTENCING JURY MUST BE INSTRUCTED TO CONSIDER SPECIFIC FACTS AS CONSTITUTING MITIGATION.

The utter lack of merit in Buchanan's claim, and the reasons why this Court may not grant relief in this collateral proceeding, are apparent once it is determined exactly what Buchanan seeks. In this regard, it is important to define not only what his claim is, but what it is not.

Buchanan argues on brief repeatedly that his jury was not given any instruction "explaining the concept of mitigation." (Pet. Br. at 13, 16, 20, 23 n.15, 24, 25, 27, 28, 29). The petitioner, however, never asked the state trial or appellate court for an instruction defining in general terms the "concept of mitigation." At trial, he ***agreed*** that Virginia's pattern sentencing instructions should be given and then asked the court additionally to instruct the jury that four specific factors each "mitigates against imposing the death penalty." (JA 75-76). The basis for Buchanan's request was that the factors were set forth in Virginia Code § 19.2-264.4(B) and he, therefore, supposedly was entitled to tell the jury what the statute said. (JA 39-40). Except for the addition of a general citation to the federal Constitution, his argument on direct appeal to the Virginia Supreme Court was the same. Thus, the only question properly before the Court in this collateral case is whether the Virginia Supreme Court reasonably found that the Eighth Amendment did not require Buchanan's jury to be instructed, as he had requested, that specific evidence did in fact mitigate against imposition of the death penalty. On that question, the law is clear.

A. The Eighth Amendment's Requirement Of Individualized Sentencing Does Not Dictate To The States That Juries Must Be Told That Certain Facts Are Mitigating.

Whether couched in terms of a request for a general instruction on what "mitigation" means - a request never made in this case - or in terms of a request for instruction on specific mitigating factors, Buchanan's claim is doomed under this Court's dispositive precedents which have delineated clearly the requirements for the "selection phase" of a capital sentencing proceeding. This Court has not been misled in the past by petitioners who have attempted to blur the distinction between the narrowing and channeling requirements for the "eligibility phase" of the sentencing proceeding and the contrary requirements in the "selection phase," and it should not be misled now by Buchanan.

In *McGautha v. California*, 402 U.S. 183 (1971), Justice Harlan's opinion for the Court held as follows:

> Those who have come to grips with the hard task of actually attempting to draft means of channeling capital sentencing discretion have confirmed the lesson taught by . . . history. . . . To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability.

402 U.S. at 204. With respect to the individualized sentencing required in the "selection phase" of a capital sentencing proceeding, this holding is as authoritative today as it was in 1971. One year later, however, the Court struck down the death penalty statutes in forty

States as well as the federal government because the then-existing sentencing schemes did not channel and limit the sentencer's discretion to find defendants eligible for the death penalty in the first place. *See Furman v. Georgia*, 408 U.S. 238, 309-313 (1972) (opinions of Stewart, J. and White, J.).

Since *Furman*, this Court has insisted that States provide clear standards that guide the sentencer's discretion, prevent arbitrariness and administer the death penalty in such a way that rationally can distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not. The post-*Furman* statutory schemes which have been found to meet these requirements are varied. Some States, like Florida, have chosen to employ a weighing system in which its sentencing juries and judges must make particular findings of the existence of specified aggravating and mitigating factors and then weigh them to see which side of the scales prevails. *See Proffitt v. Florida*, 428 U.S. 242, 246 (1976).

Other States, like Georgia, California and Virginia[2], have opted for a non-weighing system. In Georgia, a person found guilty of murder becomes eligible for the death penalty upon the jury's finding of a specified aggravating factor; however, "absolute discretion" then is given the jury in the "selection phase" to refuse to impose the penalty upon its consideration of all evidence in mitigation of punishment. *See Zant v. Stephens*, 462 U.S. at 870-872. And in California, the defendant's eligibility for the death penalty is determined in the guilt phase of trial by a finding that he committed murder plus a "special

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[2] Virginia's particular system is discussed in detail below in Argument B.

circumstance," after which the punishment is selected through the sentencer's consideration of a number of specified factors, although the factors are not identified for the jury as either "aggravating" or "mitigating." *See Tuilaepa*, 512 U.S. at 969.

In every approved system, the Court has found the Eighth Amendment satisfied where "the scheme provides for categorical narrowing at the ***definition stage***, and for individualized determination and appellate review at the ***selection stage***." *Zant*, 462 U.S. at 879 (emphasis added); *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (Stewart, J.). Concerning the "selection stage," the Court has made clear that the fact-finder may not be ***precluded*** from considering, and may not ***refuse*** to consider, any relevant mitigating evidence. *See Eddings*, 455 U.S. at 113-114; *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion). *Lockett* "requires the sentencer to listen." *See Eddings*, 455 U.S. at 155 n.10. However, "the absence of legislative or court-imposed standards to govern the jury in weighing the significance of . . . aggravating circumstances does not render the . . . capital sentencing statute invalid. . . . " *Zant*, 462 U.S. at 880.

Significantly, once the sentencer's discretion properly has been channeled by narrowing the class of persons for whom the death penalty is possible and has allowed the sentencer to consider all relevant evidence presented by the defendant as mitigating against imposition of the death penalty, this Court ***never has held that*** the sentencer also then must be instructed specifically that particular evidence is in fact mitigating. Indeed, the Court has held exactly the opposite.

In *Tuilaepa*, the prisoner argued that certain of California's sentencing factors were violative of the Eighth

Amendment because they instructed the jury to consider an "open-ended subject matter" rather than requiring it to answer a factual question as to whether the factor constituted mitigation. 512 U.S. at 978. The Court, however, in an opinion joined by six Justices, made clear that while the Eighth Amendment encompasses two separate procedural aspects of capital sentencing - the eligibility decision and the selection decision, *id.* at 971 - the "channeling" requirement for eligibility factors simply does not apply to the "selection phase" of the process. *Id.* at 977-978. The Court held that, "at the selection stage, the States are not confined to submitting to the jury specific propositional questions." *Id.* at 978.

Citing *McCleskey v. Kemp*, 481 U.S. 279, 315 n.37 (1987), *Tuilaepa* reiterated that " 'discretion to evaluate and weigh the circumstances relevant to the particular defendant and the crime he committed' is not impermissible in the capital sentencing process." *Tuilaepa*, 512 U.S. at 979. Citing both *Zant*, 462 U.S. at 875, and *Barclay v. Florida*, 463 U.S. 939, 948-951 (1983), the Court concluded that,

> Indeed, the sentencer may be given "unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty."

Tuilaepa, 512 U.S. at 979-980. Then, in an opinion concurring in the judgment, and joined by Justice Ginsburg, Justice Stevens wrote as follows:

> The question is whether, in addition to adequately narrowing the class of death-eligible defendants, the State must channel the jury's sentencing discretion when it is deciding whether to impose the death sentence on an eligible defendant by requiring the trial judge to characterize relevant sentencing factors as aggravating or mitigating. In *Zant* we held that the incorrect characterization of a relevant factor as an aggravating factor did not prejudice the defendant; it follows, I believe, that the failure to characterize factors such as the age of the defendant or the circumstances of the crime as either aggravating or mitigating is also unobjectionable.

Tuilaepa, 512 U.S. at 981 (Stevens, J., concurring in judgment).

Tuilaepa thus is dispositive of Buchanan's claim, for in it, eight Justices stated in the clearest terms that the strictures placed on the eligibility determination, including the necessity for specific narrowing instructions and fact-finding, not only play no part in the "selection phase," but actually could run afoul of the *Lockett-Eddings* rule that allows, if not mandates, complete discretion in the sentencer's ultimate decision to give life or death. *See, e.g., Lockett*, 438 U.S. at 622 (White, J., concurring and dissenting in part) ("The Court has now completed its about-face since *Furman*. . . . "); *Walton v. Arizona*, 497 U.S. 639, 664 (1990) (Scalia, J., concurring) ("To acknowledge that 'there perhaps is an inherent tension' between [the *Lockett-Eddings*] line of cases and the line stemming from *Furman*, . . . is rather like saying that there was perhaps an inherent tension between the Allies and the Axis Powers in World War II").

But even considering only pre-*Tuilaepa* cases it is clear that what Buchanan is asking for never has been part of the constitutional requirements for the "selection" process. This Court steadfastly has refused to expand the Eighth Amendment to require States to give specific

instructions on mitigating circumstances. In *Franklin v. Lynaugh*, 487 U.S. 164 (1988), for example, the prisoner argued that the trial court's refusal to give instructions on mitigation violated the Eighth Amendment right to present, and have considered, mitigating evidence. Under the Texas "special issues" scheme, no mention of "mitigation" was made to the jury and, other than the two special issues presented to the jury, the court merely instructed it to arrive at a "verdict based on all the evidence." 487 U.S. at 170. The petitioner did not complain that he was denied the opportunity to present mitigating evidence or that his jury was instructed to ignore his evidence; rather, he argued that, under *Lockett*, the "special issues" alone were insufficient to allow the jury to give full consideration to his mitigation or to give it "independent mitigating weight." *Id.* at 171-172. This Court rejected the challenges, finding that, even after *Lockett*, the "special issues" had been found to "allo[w] the jury to consider the mitigating aspects of the crime and the unique characteristics of the perpetrator, and therefore sufficiently provid[e] for jury discretion." *Id.* at 182, *quoting Lowenfield v. Phelps*, 484 U.S. 231, 245 (1988).

Similarly, in *Boyde v. California*, 494 U.S. 370 (1990), the prisoner argued that an instruction to consider circumstances which extenuate the gravity of the crime did not allow the jury to consider mitigating evidence of his background and character or to decline to give the death penalty even if the aggravating factors outweighed the mitigating ones. Citing *Blystone v. Pennsylvania*, 494 U.S. 299 (1989), the Court rejected Boyde's claim because "[t]he requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant mitigating evidence," without instruction on a

specific factor. *Boyde*, 494 U.S. at 377. The Court went on to repeat that "States are free to structure and shape consideration of mitigating evidence 'in an effort to achieve a more rational and equitable administration of the death penalty.' " *Id., quoting Franklin*, 487 U.S. at 181. Indeed, in *Johnson v. Texas*, 509 U.S. 350 (1993), the Court held that "*Lockett* and its progeny stand only for the proposition that a State may not cut off in an absolute manner the presentation of mitigating evidence, either by statute or judicial instruction, or by limiting the inquiries to which it is relevant so severely that the evidence could never be part of the sentencing decision at all." 509 U.S. at 361, *quoting McCoy v. North Carolina*, 494 U.S. 433, 456 (1990) (Kennedy, J., concurring in judgment).

The Court in *Boyde*, moreover, fashioned a standard for reviewing jury instructions claimed to restrict impermissibly a jury's consideration of mitigating evidence: "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyde*, 494 U.S. at 380. In Boyde's case, the challenged instruction was upheld because it did not prevent argument on, or consideration of, Boyde's background and character evidence. Moreover, the Court found it unlikely that the jury had believed that the challenged instruction had turned four days of listening to defense evidence into a "virtual charade." *Id.* at 383, *quoting California v. Brown*, 479 U.S. 538, 542 (1987). And the Court also noted that the prosecutor explicitly had accepted Boyde's character evidence as a proper factor to weigh, but nevertheless had argued (properly) that the factor did not deserve much weight in the balance. *Boyde*, 494 U.S. at 385. Under *Tuilaepa* and *Boyde*, the Virginia Supreme Court's decision

to refuse Buchanan's request for specific mitigation instructions was well within the bounds of what the Eighth Amendment commands. *See Romano v. Oklahoma*, 512 U.S. 1, 7 (1994) ("Within these constitutional limits, 'the States enjoy their traditional latitude to prescribe the method by which those who commit murder shall be punished' ").

B. Virginia's Capital Sentencing Scheme Satisfies The Eighth Amendment.

Virginia's post-*Furman* sentencing scheme for capital cases demonstrates its compliance generally, and in Buchanan's case specifically, with the dictates of the Eighth Amendment. In fact, in many significant ways, it is identical to the Georgia sentencing scheme that consistently has been approved by this Court.[3] In Virginia's first post-*Furman* case, the Virginia Supreme Court described Virginia's statutory scheme. *See Smith v. Commonwealth*, 219 Va. 455, 471, 248 S.E.2d 135, 145-146 (1978), *cert. denied*, 441 U.S. 967 (1979). Four separate

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[3] Georgia analogizes its scheme to a pyramid. To reach the apex of the pyramid and merit a death sentence, the homicide must pass through three divisional planes: the first, lower plane separates murder from all other homicides, the crimes are defined by statute and the jury makes a factual finding as to the grade of homicide; the second, higher plane separates death-eligible murders from all other murders by the jury's factual finding as to what statutory aggravating factor exists; the apex, or third, plane divides death-eligible murders into those where a death sentence will be imposed and those where a life sentence will be imposed by vesting "absolute discretion" in the sentencer to establish the plane. In the final determination, the sentencer makes no findings except to determine sentence. *See Zant*, 462 U.S. at 870-872.

proceedings must occur before a sentence of death can be executed. First, the jury must determine whether the defendant is guilty of capital murder, a Class 1 felony, or of a lesser offense.[4] *Id*. Second, if the jury finds the defendant guilty of capital murder,

> there must be a second trial by the same jury to determine the issue whether the penalty should be death or imprisonment for life. Bearing upon that determination, the jury may hear evidence concerning circumstances surrounding the offense, the history and background of the accused, and facts in mitigation of the offense. For illustrative purposes and not by way of limitation, five mitigating circumstances are expressly listed.
>
> The jury may not recommend the death penalty unless the Commonwealth establishes one of two factors in aggravation of the offense. . . . ***It is clear from the statutory context that, even when the Commonwealth establishes either or both aggravating circumstances, the jury is at liberty, in consideration of circumstances in mitigation, to recommend a sentence of imprisonment for life.***
>
> The penalty verdict must be in writing in one of two prescribed forms – one for a life sentence and the other for a death sentence. The latter

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[4] For purposes of punishment and sentencing, the Virginia General Assembly has divided all felonies into six classes. Va. Code § 18.2-9. Only Class 1 felonies are punishable by death, Va. Code § 18.2-10, and only certain aggravated murders defined as capital murder constitute Class 1 felonies. *See* Va. Code § 18.2-31 (the "willful, deliberate, and premeditated killing" of a person in conjunction with the commission of another specified felony or specified circumstance, such as Buchanan's murder of more than one person in the same act or transaction).

> contains a recitation of a finding of either "dangerousness" or "vileness" ***and a statement that the jury has considered evidence in mitigation of the offense***.

Smith, 219 Va. at 472-473, 248 S.E.2d at 145 (emphasis added); *see also Turner v. Murray*, 476 U.S. 28, 34 (1986) (noting that Virginia's sentencing scheme requires the jury to find at least one aggravating factor and to consider any mitigating evidence before fixing the sentence at death, and that Virginia juries enjoy "greater discretion than other systems" because the jury may impose a life sentence even if it finds an aggravating factor and no mitigating evidence has been offered).

Third, if the jury recommends the death penalty, the trial judge must order a probation officer to prepare a report on the history of the defendant and, after provision and notice of the report to the defendant, must conduct a hearing in which the probation officer is made available for cross-examination and the defendant may present any other additional relevant evidence. *Smith*, 219 Va. at 472-473, 248 S.E.2d at 146; *see also* Va. Code § 19.2-264.5. Upon "good cause shown," the judge may reduce the sentence to life imprisonment. *Id.*

Fourth, if the trial judge affirms the sentence of death, the defendant is entitled to an automatic appeal of the sentence to the Virginia Supreme Court and to priority placement on the Court's docket of appeals. *See* Va. Code § 17-110.2. The Virginia Supreme Court is required to determine whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factor, and whether the penalty is excessive or disproportionate to other similar cases, considering both the crime and the defendant. *See* Va. Code § 17-110.1; *Smith*, 219 Va. at 473, 248 S.E.2d at 146.

Virginia's pattern sentencing instruction (set forth above at p. 6) has been upheld as constitutional, uniformly and repeatedly by the Virginia Supreme Court and the Fourth Circuit. In *Smith*, the Virginia Supreme Court rejected the defendant's claim that the instruction emphasized aggravating factors and thereby called for a mandatory death sentence. The Court concluded that "read as a whole, [the instruction] fairly expounds the thrust of the statute," and that by telling the jury it "may fix" punishment at death, the jury obviously is at liberty not to do so. *Smith*, 219 Va. at 479-480, 248 S.E.2d at 150.

In *Clark v. Commonwealth*, 220 Va. 201, 212, 257 S.E.2d 784, 791 (1979), *cert. denied*, 444 U.S. 1049 (1980), the defendant argued that the jury was "led" into finding aggravating factors because those two factors were listed for the jury, whereas the mitigating factors were not. The Virginia Supreme Court rejected the challenge as follows:

> The requirement of the statute that the aggravating factors be listed and that discretion in sentencing be suitably directed and limited so as to minimize the risk of arbitrary and capricious action, is dictated by the holding in *Furman v. Georgia*, 408 U.S. 238 (1972), and in *Gregg, supra*.
>
> The listing of aggravating factors benefits the accused because the jury is thereby limited to a consideration of statutory aggravating circumstances. On the contrary, a jury is not so limited in considering mitigating factors, but may consider any and all mitigating factors. *Lockett v. Ohio*, 438 U.S. 586 (1978).

Id.[5]

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[5] In an unbroken, unanimous line of authority from *Clark* to the present day, the Virginia Supreme Court has adhered to its

In *Buchanan*, the Virginia Supreme Court restated its settled holding:

> The rule that the mitigating factors mentioned in the statute must not be listed is intended to benefit the defendant. If the factors suggested in the statute were listed, the jury could be misled into concluding that those were the only factors it could consider in mitigation. But the intent of the statute is to leave the jury free to consider, in mitigation, whatever the jury deems appropriate. *Watkins*, 229 Va. at 491, 331 S.E.2d at 438; *Clark*, 220 Va. at 212, 257 S.E.2d at 790.

(JA 84).

The Fourth Circuit, of course, is the federal court most familiar with, and therefore better able to interpret, the law of Virginia. *See Frisby v. Schultz*, 487 U.S. 474, 482 (1988). That court also unanimously and repeatedly has rejected Buchanan's claim. In *Briley v. Bass*, 750 F.2d 1238, 1241-1245 (4th Cir. 1984), *cert. denied*, 470 U.S. 1088 (1985), the Court of Appeals considered and rejected Briley's claim that the Virginia pattern instruction did not adequately charge the jury to consider mitigating circumstances:

> ***All the evidence***, we believe, necessarily means that the jury was to consider the evidence presented in mitigation as well as that in aggravation in reaching its decision. A contrary interpretation, in which inquiry ceased after the finding of an aggravating circumstance, would have rendered the presentation of the case in mitigation by the defense inexplicable to the jury, as the evidence was irrelevant to either of the statutory aggravating circumstances. Our view finds further support in the trial judge's reading of the statutory jury verdict forms for each of the capital murders, which contained the phrases "having considered the evidence in mitigation of the offense" and "having considered all the evidence in aggravation and mitigation of such offense." . . . The instructions leave the definite impression that the jury was to take into account such evidence as was presented in mitigation and to exercise discretion in reaching a

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precedent. *See, e.g., LeVasseur v. Commonwealth*, 225 Va. 564, 594, 304 S.E.2d 644, 660-661 (1983), *cert. denied*, 464 U.S. 1063 (1984); *Watkins v. Commonwealth*, 229 Va. 469, 491, 331 S.E.2d 422, 438 (1985), *cert. denied*, 475 U.S. 1099 (1986); *Gray v. Commonwealth*, 233 Va. 313, 351, 356 S.E.2d 157, 178, *cert. denied*, 484 U.S. 873 (1987); *Mackall v. Commonwealth*, 236 Va. 240, 257, 372 S.E.2d 759, 770 (1988), *cert. denied*, 492 U.S. 925 (1989); *Eaton v. Commonwealth*, 240 Va. 236, 257, 397 S.E.2d 385, 398 (1990), *cert. denied*, 502 U.S. 824 (1991); *Stockton v. Commonwealth*, 241 Va. 192, 215, 402 S.E.2d 196, 209, *cert. denied*, 502 U.S. 902 (1991); *Yeatts v. Commonwealth*, 242 Va. 121, 126, 410 S.E.2d 254, 258 (1991), *cert. denied*, 503 U.S. 946 (1992); *George v. Commonwealth*, 242 Va. 264, 283, 411 S.E.2d 12, 23 (1991), *cert. denied*, 503 U.S. 973 (1992); *Satcher v. Commonwealth*, 244 Va. 220, 228, 421 S.E.2d 821, 826 (1992), *cert. denied*, 507 U.S. 933 (1993); *Swann v. Commonwealth*, 247 Va. 222, 228, 441 S.E.2d 195, 200, *cert. denied*, 513 U.S. 889 (1994); *Mickens v. Commonwealth*, 247 Va. 395, 404, 442 S.E.2d 678, 684, *cert. granted and sentence vacated on other grounds*, 513 U.S. 922 (1994); *Breard v. Commonwealth*, 248 Va. 68, 74, 445 S.E.2d 670, 675, *cert. denied*, 513 U.S. 971 (1994); *Joseph v. Commonwealth*, 249 Va. 78, 82, 452 S.E.2d 862, 865, *cert. denied*, 116 S.Ct. 204 (1995); *Roach v. Commonwealth*, 251 Va. 324, 336, 468 S.E.2d 98, 105, *cert. denied*, 117 S.Ct. 365 (1996); *Barnabei v. Commonwealth*, 252 Va. 161, 176, 477 S.E.2d 270, 279 (1996), *cert. denied*, 117 S.Ct. 1724 (1997); *Mickens v. Commonwealth*, 252 Va. 315, 320, 478 S.E.2d 302, 305 (1996), *cert. denied*, 117 S.Ct. ___ (1997).

verdict on sentencing, rather than automatically imposing the death sentence upon finding an aggravating circumstance. Petitioner's contention falls far short of satisfying the standard of *Cupp [v. Naughten*, 414 U.S. 141 (1973)] and *Henderson [v. Kibbe*, 431 U.S. 145 (1977)] for reversal on collateral review, that "the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." Petitioner contends that the trial judge's failure to offer a fuller explanation of the concept of mitigation renders the sentences unconstitutional. We disagree. The Supreme Court has never attempted to prescribe the precise form that state jury instructions must take.

* * *

All the cases upon which petitioner relies, however, were decided prior to *Zant v. Stephens*, in which the Supreme Court ruled that "the Constitution does not require a State to adopt specific standards for instructing the jury in its consideration of aggravating and mitigating circumstances." Under *Zant*, "[w]hat is important at the selection stage is an ***individualized*** determination on the basis of the character of the individual and the circumstances of the crime" (emphasis in original), and the "absence of legislative or court-imposed standards to govern the jury in weighing the significance" of the various factors is not dispositive. It is inappropriate for the federal courts on collateral review to go beyond the correction of fundamental errors implicating due process rights and attempt to prescribe the particular form which state jury instructions on mitigation must take, becoming mired in the nuances of definition and technicalities of draftsmanship. We hold that the instructions

> given here satisfied the essential requirements of due process under the Eighth and Fourteenth Amendments, in that they did not render the death sentence in any way mandatory or preclude consideration of any relevant mitigating evidence.

Briley, 750 F.2d at 1243-1245 (emphasis in original) (citations omitted).

The Fourth Circuit repeated its *Briley* holding in *Clozza v. Murray*, 913 F.2d 1092, 1103-1104, 1105 (4th Cir. 1990), *cert. denied*, 499 U.S. 913 (1991), and upheld it again in *Clanton v. Muncy*, 845 F.2d 1238, 1242 (4th Cir.), *cert. denied*, 485 U.S. 1000 (1988), despite Clanton's attempt to claim the benefit of this Court's then-recent grant of certiorari in *Franklin v. Lynaugh*. Indeed, the Fourth Circuit "consider[ed] it important to emphasize" the futility of any comparison between the Virginia and Texas systems:

> The Texas and Virginia sentencing statutes are not equivalent. Under Texas law, if the jury finds three statutory factors to be present, then the court "shall sentence the defendant to death." The significance of instructions on mitigating evidence under such a scheme has no relevance to Virginia's statute, under which jurors are always free to impose a life sentence, despite a finding of aggravating factors.

Clanton, 845 F.2d at 1242 (citations omitted).

In *Jones v. Murray*, 947 F.2d 1106, 1119 (4th Cir. 1991), *cert. denied*, 503 U.S. 973 (1992), the Court of Appeals again dealt with the issue. Rejecting Jones' contention that *Penry v. Lynaugh*, 492 U.S. 302 (1989), called for a different result than the court previously had reached in *Briley*, the court held as follows:

The instruction given to the jury at the sentencing phase of Jones' trial cannot be said to have left a reasonable juror with the belief that there was no vehicle for expressing the view that Jones did not deserve to be sentenced to death, based upon his mitigating evidence. See *Penry*. Taken as a whole,[11] the instructions leave no doubt that the jury was free to consider mitigating evidence and recommend life imprisonment. The trial court, for example, and to repeat, explicitly charged the jury in the ultimate paragraph of the instruction on the sentence to impose:

> If you find from the evidence that the Commonwealth has proven beyond a reasonable doubt that the offense was outrageously or wantonly vile, horrible or inhuman, then you may fix the punishment of the defendant at death or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at life imprisonment.
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> * * *

The term "all the evidence" necessarily includes the evidence in mitigation as well as that in aggravation. Furthermore, the statutory jury verdict form used by the jury stated that it had "considered the evidence in mitigation of the offense." We believe that, as in *Briley*, the instructions given to the jury "leave the definite impression that the jury was to take into account such evidence as was presented in mitigation and to exercise discretion in reaching a verdict on sentencing, rather than automatically imposing the death sentence upon finding an aggravating circumstance." This conclusion fully accords with *Penry*'s requirement that a jury must be able "to consider and give effect to any

mitigating evidence relevant to a defendant's background and character, or the circumstances of the crime." See *Boyde v. California*. By allowing the jury to consider all relevant mitigating evidence, the procedure by which Jones was sentenced satisfied the requirement of the Eighth and Fourteenth Amendments of individualized sentencing in capital cases. *Blystone v. Pennsylvania*; *Lockett v. Ohio*.

> [11]In reviewing jury instructions, we emphasize that "a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Cupp v. Naughten*. We further note that "[t]he burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than a showing required to establish plain error on direct appeal." *Henderson v. Kibbe*.

Jones, 947 F.2d at 1119-1120 (citations omitted).

Indeed, so clear to the Fourth Circuit was the claim's lack of merit under Virginia's system that in *Peterson v. Murray*, 949 F.2d 704, 705 (4th Cir.), *stay denied*, 501 U.S. 1271 (1991), it held that "Peterson's claim . . . that the trial court's penalty phase instructions did not explain the meaning and function of mitigating circumstances [is] the most evident example . . . of [a] request . . . for [a] new rule . . . upon collateral review of the case."[6]

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[6] *See also Pruett v. Thompson*, 996 F.2d 1560, 1577 (4th Cir.) (no ineffective counsel for failing to request instructions on mitigation because the instruction to consider "all the evidence" told the jury it must consider mitigating evidence), *cert. denied*, 510 U.S. 984 (1993); *Spencer v. Murray*, 18 F.3d 237, 239 (4th Cir.

In Buchanan's case, the Court of Appeals applied its established precedents to reject the petitioner's claim that the trial court had violated the Eighth Amendment by refusing his proffered instructions on specific mitigating factors:

> The Eighth Amendment requires that a capital sentencing jury's discretion be "guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition." *Proffitt v. Florida*. To accomplish this purpose, a capital sentencing jury must be properly instructed. *Walton v. Arizona*, 497 U.S. 639, 653 (1990). However, the Eighth Amendment does not require states to adopt specific standards for instructing juries on aggravating and mitigating circumstances. *Zant v. Stephens*.
>
> Guided by those constitutional principles, this court has previously analyzed and rejected the argument now asserted by Buchanan. In *Clozza v. Murray*, we held that Virginia's death penalty scheme survives constitutional scrutiny, despite its "failure to instruct the jury on statutory mitigating factors." In addition, this court has reviewed and approved the constitutionality of jury instructions, used in other Virginia death penalty cases, that were essentially identical to the instructions contested in this case. *Jones v. Murray*; *Briley v. Bass*.

1994) (claim defaulted and without merit under *Jones* and *Briley*); *Bennett v. Angelone*, 92 F.3d 1336, 1350 (4th Cir.) (no ineffective counsel for failing to object to penalty instructions and verdict form or to explain mitigation to jury), *cert. denied*, 117 S.Ct. 503 (1996).

> In its verdict, the jury . . . certified that it had "considered the evidence in mitigation of the offense." In *Jones*, we concluded that "[b]y allowing the jury to consider all relevant mitigating evidence, [Virginia's sentencing] procedure . . . satisfied the requirement of the Eighth and Fourteenth Amendments of individualized sentencing in capital cases." In light of this precedent, Buchanan's Eighth Amendment claim must fail.

(JA 204-205) (citations omitted).

The foregoing review of Virginia's sentencing procedure, the Fourth Circuit's analysis of that procedure and this Court's pronouncements on what is required under the Eighth Amendment, make clear that Buchanan is not entitled to relief. Viewed under either the "new rule" doctrine as this collateral case must be reviewed (see Argument C below), or on its merits, Buchanan's claim must fail because the Virginia Supreme Court's rejection of his claim was constitutionally reasonable, this Court never has dictated a contrary result and there is no reasonable likelihood that the petitioner's jury applied the sentencing instructions in a way that prevented it from considering the mitigation evidence Buchanan presented.

C. Buchanan's Claim Is Barred By The New Rule Doctrine.

Because Buchanan comes to this Court on collateral review instead of by way of direct appeal, his conviction and sentence may not be disturbed "unless it can be said that a state court, at the time the conviction or sentence became final, would have acted objectively unreasonably by not extending the relief later sought in federal court."

O'Dell v. Netherland, 117 S.Ct. 1969, 1973 (1997); *see also Lambrix v. Singletary*, 117 S.Ct. 1517, 1525 (1997) ("our first and principal task is . . . to determine . . . whether . . . the unlawfulness of Lambrix's conviction was apparent to all reasonable jurists"); *Gray v. Netherland*, 116 S.Ct. 2074, 2083 (1996) ("habeas relief is appropriate only if 'a state court considering [the petitioner's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the Constitution.' ") (quoting *Saffle v. Parks*, 494 U.S. 484, 488 (1990)); *Teague v. Lane*, 489 U.S. 288 (1989).[7]

It is settled that the *Teague* inquiry is conducted in three steps: (1) the date on which the petitioner's case became final is determined; (2) the "legal landscape" at that time is surveyed to determine whether the state court would have felt compelled to conclude the petitioner's claim was required by the Constitution; and (3) if not compelled, the rule is "new" and the Court must determine whether it meets one of two exceptions to the *Teague* doctrine. *See O'Dell*, 117 S.Ct. at 1973.

Buchanan's conviction and sentence became final on January 22, 1990, when this Court denied his petition for a writ of certiorari on direct appeal. *See Caspari v. Bohlen*, 510 U.S. 383, 390 (1994). In order for Buchanan to prevail, he must establish that the Eighth Amendment required in 1990 that his jury be instructed that certain evidence is a

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[7] The respondent raised the "new rule" defense in the Fourth Circuit (Resp. Br. at 10-11) and in his brief in opposition to Buchanan's petition for a writ of certiorari. (Resp. Br. in Opp. at 8-9). The Fourth Circuit did not address the new rule implications of Buchanan's claim.

"fact which mitigates against imposing the death penalty." (JA 74-76). He also must establish that the Virginia Supreme Court's ruling that the requested instructions were not required because they risked limiting the jury's freedom to consider anything as mitigation, was a ruling that no reasonable jurist could have made. *See Graham v. Collins*, 506 U.S. 461, 477 (1993).

Buchanan has not even attempted to meet these threshold requirements of the new rule doctrine, but rather has made an argument more suitably directed to the state legislature: other States have chosen to list mitigating factors in jury instructions, so Virginia should do so too. *See, e.g.*, Pet. Br. at 26 (Virginia's decision "rests on no legislative determination of necessity (***or*** propriety), nor would any discernible legislative policy be adversely affected if it were stopped") (emphasis in original); Pet. App. 1-45 (listing the jury instructions given in other States).[8]

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[8] Apart from the fact that what other States – most of which employ "weighing" systems in which a list of mitigating factors makes sense – have chosen to do says nothing about the constitutionality of Virginia's instructions in a non-weighing system, Buchanan appears to have set forth in his appendix the statutes and instructions in effect ***today*** in those States. The reasonableness of the Virginia Supreme Court's ruling, however, depends only on what the state of the law was in January, 1990. *See, e.g., Gregg*, 428 U.S. at 222 (White, J., concurring) ("The Georgia Legislature has plainly made an effort to guide the jury in the exercise of its discretion, while at the same time permitting the jury to dispense mercy on the basis of ***factors too intangible to write into a statute***") (emphasis added); *Zant v. Stephens*, 456 U.S. 410, 411 n.1 (1982) (Georgia sentencing instruction directed jury to consider any mitigating or aggravating circumstances but specified only aggravating factors).

In addition to his irrelevant legislative argument,[9] *see Tuilaepa*, 512 U.S. at 978 ("Our decisions in *Zant* and *Gregg* reveal that, at the selection stage, the States are not confined to submitting to the jury specific propositional questions"), Buchanan's contention rests primarily upon a confusion between what is constitutionally required for the "eligibility stage" and what is required for the "selection stage." Indeed, after stating correctly that his case deals only with the "selection" phase of trial (Pet. Br. at 17), Buchanan erroneously recites the holdings of this Court's "eligibility" cases as support for his claim. *See* Pet. Br. at 18-19 (relying on *Godfrey v. Georgia*, 446 U.S. 420 (1980) and *Stringer v. Black*, 503 U.S. 222 (1992)).

As previously shown, the channeling required for the "eligibility" phase of a capital sentencing proceeding is simply not transferable to the "selection" phase. The "separate requirement," *see Tuilaepa*, 512 U.S. at 972, for the "selection phase" is "satisfied by allowing the jury to consider all relevant mitigating evidence," *id.* at 972-973, and "it must be recognized that the States may adopt capital sentencing processes that rely upon the jury, in its sound judgment, to exercise wide discretion." *Id.* at 974.

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[9] Petitioner's amicus also makes an argument that, because so many other States now require specification of mitigating factors, then the Eighth Amendment's "evolving standards of decency" requires Virginia to do the same. (Amicus Br. at 10). In addition to the fact that this Court's rulings giving States freedom in the area of developing proper sentencing systems contravenes amicus' theory, this Court has not extended the comparative "decency" standard into the arena of what particular sentencing instruction must be given to a jury in a state capital trial. This Court certainly should not decide to employ that standard for the first time in a collateral case.

In short, Buchanan's attempt to engraft upon the "selection phase" the requirements of narrowing and fact-specificity applicable to the "eligibility phase," is a bridge this Court already crossed in *Tuilaepa*, and one it may not recross in this collateral case.

Buchanan wanted his jury directed and limited by focusing on specific factors and then directed, not simply to consider those facts in the open-ended way California has chosen and which this Court has approved in *Tuilaepa*, but to conclude that the circumstances he specified such as his age, no criminal record, his capacity to appreciate the criminality of his conduct, etc., were facts which actually mitigated imposition of the death sentence. (JA 74-76).[10] Certainly no precedent binding on the Virginia Supreme Court ever has "compelled" or "dictated" such limitation on the "selection phase." Indeed, the petitioner's claim is so clearly not "compelled" that Buchanan did not even believe it important enough to include in his certiorari petition on direct appeal in 1990, although he was on notice then that the new rule doctrine would bar its consideration later.

Just as in *Saffle*, the petitioner is asking for the creation of "a rule relating, not to ***what*** mitigating evidence the jury must be permitted to consider in making its sentencing determination, but ***how*** it must consider the

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[10] Certainly one of the impermissible results of the requested instructions would have been a limitation on the jury's freedom to consider Dr. Brown's testimony concerning Buchanan's high score on the "psychopathic deviancy scale" (Tr. 1390-1391, 1418-1419), as an aggravating factor. *See Tuilaepa*, 512 U.S. at 983 (Stevens, J., concurring) (both defendant and prosecutor have the right to adduce favorable or unfavorable evidence on sentencing factors).

mitigating evidence." 494 U.S. at 490 (emphasis in original). Just as in *Saffle*, the petitioner does not contend that the State "altogether prevented" the jury from considering his evidence, but rather that the State "has unconstitutionally limited the manner in which his mitigating evidence may be considered." *Id.* at 491. Clearly, Buchanan's claim constitutes an impermissible new rule, just as Saffle's did. *See also Henderson v. Kibbe*, 431 U.S. at 155 (petitioner's burden of demonstrating that an erroneous instruction is so prejudicial as to support a collateral attack on a state criminal judgment is even greater than the showing required to establish plain error on direct appeal).

Indeed, contrary to Buchanan's characterization of the Virginia Supreme Court's ruling as "mysterious" (Pet. Br. at 26), Virginia provides one of the most logical and defendant-friendly systems of capital sentencing in the Nation. Unlike, for example, the Texas system in which the death sentence is imposed automatically upon an affirmative answer to what traditionally are considered as questions regarding aggravating factors, in Virginia the jury is instructed, as is the case in Georgia, that even if it finds beyond a reasonable doubt an aggravating factor, it need not impose a death sentence but, instead, may impose a life sentence if it believes from all the evidence that the death penalty is not justified. (JA 73).[11]

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[11] Virginia's sentencing system thus provides more protection for the defendant than the Constitution requires. *See Johnson*, 509 U.S. at 371 ("we have not construed the *Lockett* line of cases to mean that a jury must be able to dispense mercy on the basis of a sympathetic response to the defendant"); *Boyde*, 494 U.S. at 377 (rejecting suggestion that jury must have freedom to decline to impose death penalty even if jury finds aggravating factors outweigh mitigating factors).

The Virginia Supreme Court's decision that a specification of particular mitigating factors could mislead the jury into concluding that it is limited to only those specified factors, undoubtedly benefits the defendant and is a conclusion that, in 1990, or now, was constitutionally reasonable. *See McGautha*, 402 U.S. at 208 ("For a court to attempt to catalog the appropriate factors in this elusive area could inhibit rather than expand the scope of consideration, for no list of circumstances would ever be really complete"). Moreover, the Virginia Supreme Court's ruling would seem to be the best, and certainly the most prudent, response to this Court's admonition that,

> States cannot limit the sentencer's consideration of any relevant circumstances that could cause it to decline to impose the penalty. In this respect, the State cannot channel the sentencer's discretion, but must allow it to consider any relevant information offered by the defendant.

McCleskey, 481 U.S. at 306. In this respect, what the Court held in 1899, in reversing a murder conviction because the trial court had directed the jury that it could not recommend mercy unless it found a mitigating circumstance, is as true today as it was then:

> How far considerations of age, sex, ignorance, illness or intoxication, of human passion or weakness, of sympathy or clemency, or the irrevocableness of an executed sentence of death, or an apprehension that explanatory facts may exist which have not been brought to light, or any other consideration whatever, should be allowed weight in deciding the question whether the accused should or should not be capitally punished, is committed by the act of Congress to the sound discretion of the jury, and of the jury alone.

Winston v. United States, 172 U.S. 303, 313 (1899), *quoted in McGautha*, 402 U.S. at 200.[12] Without question, in order to grant Buchanan the relief he requests, this Court necessarily would have to overrule a host of precedent, including *McCleskey*, *Zant* and *Tuilaepa*. *See Tuilaepa*, 512 U.S. at 978 (petitioner's claim "contravenes our precedents").

At trial, Buchanan expressly agreed that Virginia's pattern instruction should be given, a concession that was understandable given the fact that the instruction meets the Eighth Amendment's requirement for the "selection phase" by instructing the jury that "if you believe from all the evidence" that death is not justified, then a life sentence "shall" be given. (JA 73). Again, as the Fourth Circuit has articulated, "***All the evidence*** . . . necessarily means that the jury was to consider the evidence

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[12] Buchanan's assertion that his refused instruction "AB" directing the jury to consider "any other facts in mitigation" (JA 74) somehow undercuts the Virginia Supreme Court's decision that the jury could be misled by specifying certain factors, does not in any way diminish the common sense principle that a jury may give special, if not exclusive, consideration to factors which are specially highlighted by a court's instruction. *See Tuilaepa*, 512 U.S. at 983-984 (Stevens, J., concurring) ("refusing to characterize ambiguous evidence as mitigating or aggravating is . . . constitutionally permissible"); *Mackall v. Commonwealth*, 236 Va. at 258, 372 S.E.2d at 770 (singling out certain mitigating factors for special emphasis could limit impermissibly the jury's consideration of other factors not so specified). Moreover, the very factors Buchanan wanted specified for his jury, *i.e.* "extreme mental or emotional disturbance," may have led the jury to believe it could not dispense mercy if it believed he was acting under a less than extreme mental disturbance when he murdered his family. The Virginia Supreme Court's rule thus additionally safeguards against such a restriction on the jury's freedom to decide the appropriate sentence.

presented in mitigation as well as that in aggravation . . . . " *Briley*, 750 F.2d at 1243.

The Virginia Supreme Court's decision not to characterize particular evidence as mitigating, but rather to instruct the jury to consider all the evidence and to have the jury certify that it in fact considered all the mitigating evidence, was constitutionally reasonable.[13] It cannot be said that "all reasonable jurists would have deemed themselves compelled" to accept Buchanan's claim now, much less in 1990. *See Graham*, 506 U.S. at 477; *Peterson*, 949 F.2d at 705 (identical claim is "most evident example" of new rule). This Court should deny relief because to do otherwise would create an impermissible new rule of constitutional law.[14]

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[13] In the context of the new rule's "legal landscape" inquiry, *see Caspari*, 510 U.S. at 390, this Court's repeated denials of certiorari petitions in which Virginia capital defendants expressly complained about the constitutionality of the denial of specific mitigation instructions – including Buchanan's second petition for certiorari filed after his state habeas proceeding – certainly could have been considered by a reasonable state court as some measure of assurance that its rulings were not unconstitutional. (See cases listed above, notes 5 and 6 and pages 30-36); *see also Gilmore v. Taylor*, 508 U.S. 333, 344 n.3 (1993) ("The existence of . . . an institutionalized state practice over a period of years is strong evidence of the reasonableness of the interpretations given existing precedent by state courts").

[14] Just as in *Graham*, the rule Buchanan seeks – to channel the jury's discretion at the "selection phase" – meets neither of the *Teague* exceptions. It would not decriminalize a class of conduct or prohibit the imposition of capital punishment on a particular class and it is not the type of "watershed rule of criminal procedure" that is considered "implicit in the concept of ordered liberty." 506 U.S. at 477-478.

D. There Is No Reasonable Likelihood That The Jury Was Prevented From Considering Buchanan's Mitigating Evidence.

Even assuming that Buchanan could overcome the new rule obstacles facing review of his claim, he still would not be entitled to relief. First, as shown above, the Virginia Supreme Court's decision, and the Fourth Circuit's affirmance of that decision, demonstrate that the refusal of Buchanan's instructions on mitigation did not violate the Eighth Amendment's requirement that the jury be allowed to consider mitigating evidence.

Second, in *Boyde*, the Court held that "the proper inquiry . . . is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence," but that "a capital sentencing proceeding is not inconsistent with the Eighth Amendment if there is only a possibility" that the jury was prevented from considering mitigation. *Boyde*, 494 U.S. at 380; *see also Henderson*, 431 U.S. at 155 (petitioner's burden "especially heavy" where no erroneous instruction given: "an omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law"). The record in Buchanan's case, however, demonstrates that not even a possibility of such error exists.

From the very beginning of the sentencing phase, the prosecutor properly told Buchanan's jury that its job was to balance the defendant's evidence, referred to by the prosecutor as "these things that are in his favor," against "these horrible things that he has done." (JA 27). Also from the beginning of the sentencing phase, Buchanan told the jury that he would be presenting "mitigation."

(JA 29). Then, for two days, the jury listened to an extensive array of expert, and other, evidence regarding Buchanan's background, childhood and psychological status at the time he murdered his four family members. Each of the three experts who testified told the jury that he had been appointed by the court to examine the defendant for possible mitigating factors. (Tr. 1371, 1484, 1532).[15] Each expert analyzed the case with regard to Virginia's statutory mitigating factors: whether the defendant was under the influence of extreme mental or emotional disturbance and whether the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired. *See* Va. Code § 19.2-264.4(B). Just as in *Boyde* and *Brown*, it was "unlikely that reasonable jurors would believe the court's instructions transformed all of this 'favorable testimony into a virtual charade.' " *Boyde*, 494 U.S. at 383, *quoting Brown*, 479 U.S. at 542. *See also Boyde*, 494 U.S. at 384 ("the introduction without objection of volumes of mitigating evidence certainly is relevant to deciding how a jury would understand an instruction which is at worst ambiguous").

Perhaps the most significant evidence in the record that demonstrates what Buchanan's jury surely believed its duty to be comes from the closing arguments of both the prosecutor and defense attorney. ***Both*** attorneys told the jury repeatedly that it was the jury's duty to consider Buchanan's mitigating evidence and that the jury could give a life sentence even if the aggravating factor of

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[15] The jury surely believed that the testimony of the experts, commissioned as it was by the judge, was evidence which it was duty-bound to consider.

vileness had been proven.[16] (JA 43-44, 59-61, 64-66, 68). In fact, the prosecutor expressly conceded that Buchanan had proven mitigating factors. (JA 68: "If the only question was is there mitigation, we could have stopped back on Thursday night. Even Dr. Lee and Dr. Gwaltney say yes, there is some mitigating circumstances").

Buchanan attempts to minimize the impact of these arguments by reference to this Court's statement in *Boyde* that the "arguments of counsel generally carry less weight with a jury than do instructions." 494 U.S. at 384 (Pet. Br. at 30). That statement certainly has force in a case like *Boyde* where it was claimed that the prosecutor's argument had reinforced an impermissible interpretation of an instruction, *see also Penry*, 492 U.S. at 329 (prosecutor's argument led jury to believe it could not consider Penry's mitigation), but is misplaced in the context of a case like Buchanan's, where both the prosecutor and defense attorney argued in agreement and in detail regarding the very information Buchanan wanted included in the court's instructions. *See Brown*, 479 U.S. at 546 (O'Connor, J., concurring) ("On remand, the California Supreme Court should determine whether the jury instructions, taken as a whole, and ***considered in combination with the prosecutor's closing argument***, adequately informed the jury of its responsibility. . . . ") (emphasis added).

Moreover, although Buchanan disingenuously argues that the Fourth Circuit "sought solace in the paltry fact"

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[16] The vileness of Buchanan's acts, defined as "torture, depravity of mind or aggravated battery" (JA 73) never was in dispute. Buchanan's multiple shootings and vicious slashings of the victims, two of whom were under the age of 14, did not present even a close case on that issue.

that the verdict form, signed "only by the foreperson" (Pet. Br. at 27-28), certified that the jury had ***considered the evidence in mitigation of the offense,*** the Fourth Circuit properly relied on the verdict's "mitigation" language as an additional reason supporting the conclusion that Buchanan's jury considered the mitigating evidence. *See Buchanan* (JA 204-205); *Jones*, 947 F.2d at 1119-1120; *Briley*, 750 F.2d at 1243-1245. Buchanan relegates the verdict form to an after-the-fact boilerplate technicality, but the record shows otherwise. Before deliberations, the trial judge instructed the jury according to the pattern instruction and then further instructed that the two written verdict forms be taken to the jury room along with the other instructions and evidence. (JA 72). Then, upon the clerk's reading of the death verdict in open court, including the language that the jury had "considered the evidence in mitigation," the judge ***twice*** asked the jurors if that was the verdict of "each and every one of you." (Tr. 1662). Each juror, individually polled, answered that it was. (Tr. 1662-1664). Thus, as the Fourth Circuit properly recognized, the certified verdict form is clear evidence that the jury in fact considered Buchanan's mitigating evidence.

In sum, there was no dispute in this case that Buchanan had shown mitigating evidence, there was no dispute that the jury was required to consider it and there was no dispute that the jury could refuse to give a death sentence even if the aggravating factor had been proven. (JA 71: prosecutor told jury "[i]f you believe the crime was vile, I am not going to sit here and suggest to you that you must bring back a sentence of death. That is not the law."). It simply is impossible to conclude that there is

a reasonable likelihood that Buchanan's jury, after hearing the volumes of mitigating evidence in the case and, after hearing both the prosecution and defense agree on their explanation of the jury's duty to consider each mitigating factor, then took the court's instructions and verdict forms which directed it to consider all the evidence and to certify that it had considered the evidence in mitigation, and nevertheless applied those instructions in such a way that ***prevented*** it from considering the mitigating evidence.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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